

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CV 08-0776 JP/WDS  
CR 06-1454 JP

JORGE ALVARADO-MOLINA,

Defendant.

**MEMORANDUM OPINION AND ORDER**

This matter is before the Court on Defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 44) filed on August 25, 2008. *See* 28 U.S.C. § 2255 R. 4(b). Defendant asserts that he was entitled to, but did not receive, a 3-point decrease in his offense level for acceptance of responsibility.

The motion appears to be procedurally barred because it raises the issue of whether Defendant's sentence was imposed in violation of the Sentencing Guidelines, an issue that could have been raised on appeal. "A § 2255 motion is not available to test the legality of a matter which should have been raised on direct appeal." *United States v. Cox*, 83 F.3d 336, 341 (10th Cir. 1996). The substance of the motion should be examined, however, if the Court "can best serve the interests of judicial efficiency, conservation of judicial resources, and orderly and prompt administration of justice by . . . ruling on the merits, even though the . . . procedural bar would also apply." *United States v. Allen*, 16 F.3d 377, 379 (10th Cir. 1994).

Although Defendant did not raise the sentencing issue of acceptance of responsibility on direct review, an Order and Judgment filed by the Court of Appeals for the Tenth Circuit in his appeal effectively resolves this claim. In *United States v. Alvarado-Molina*, 250 F. App'x 905 (10th

Cir. 2007), *vacated and remanded*, *Alvarado-Molina v. United States*, 128 S. Ct. 2425 (2008), *on remand*, *United States v. Alvarado-Molina*, 288 F. App'x 448, 449 (10th Cir. 2008) (adopting original reasoning and result), the court stated, "The PSR . . . credited Alvarado[-Molina] for accepting responsibility for his action." 250 F. App'x at 907 (citing U.S.S.G. § 3E1.1). This statement of the factual issue by the Court of Appeals obviates adjudication of Defendant's § 2255 claim. *Cf. United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994) (declining to consider a § 2255 issue that had been resolved on direct review). Defendant is not entitled to relief, *see* § 2255 R. 4(b), and the Court will dismiss his § 2255 motion.

IT IS THEREFORE ORDERED that Defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 44) filed on August 25, 2008, is DISMISSED with prejudice, and judgment will be entered.

  
UNITED STATES DISTRICT JUDGE